UNITED MALAYAN BANKING CORP. BHD.

v.

GOODHOPE REALTY PTE. LTD. & ORS.

HIGH COURT, SINGAPORE
LP THEAN J
[ORIGINATING SUMMONS NO. 1130 OF 1986]
16 FEBRUARY 1989

LAND LAW: *Claim for equitable lien of a building for a sum of money which the lessors were obliged to refund by a covenant under a lease - Whether such equitable lien could rank prior to an interest under a mortgage - Whether an implied periodic tenancy was created and binding after the lease expired.*

By a lease dated 27 April 1976 ("the lease") the 1st defendants who were then the owners of a building ("the Building") demised to the plaintiffs parts of the Building ("the demised premises") for a term of 10 years commencing from 1 January 1976 at a quarterly rent and service charge totalling $302,081 and payable quarterly in advance. Under Clause 3(2) of the lease, the plaintiffs were obliged to pay to the 1st defendants a sum of $6,041,622 on or before the execution of the lease by way of deposit or security for the due performance and observance by the plaintiffs of all the terms and conditions of the lease, and they duly paid the sum to the 1st defendants. Under the same clause the sum was refundable by the 1st defendants to the plaintiffs after the expiry of the term of the lease.

On 27 July 1982, the 1st defendants executed a mortgage of the Building to the 2nd defendants as agents for themselves and the 3rd defendants to secure the repayment by a company of all moneys, interests and other liabilities from time to time due to the 2nd and 3rd defendants under a loan agreement as therein provided. In 1985 or thereabouts, the 2nd defendants exercised their rights as a mortgagee and appointed one Mr. Peter M.K. Chi as receiver of income of the Building (including the demised premises) and notice of the appointment was served on the plaintiffs on or about 3 July 1985 requesting or directing payment of rent to be made to the receiver. The plaintiffs subsequently paid the rent and service charge to the receiver in compliance with the notice of the receiver. On 5 July 1985, the plaintiffs lodged a caveat under s. 104 of the Land Titles Act seeking to protect their interest under the lease. On 28 November 1985, the plaintiffs lodged another caveat seeking to protect what they called an equitable lien on the Building to secure repayment of the $6,041,622 paid under Clause 3(2) of the lease.

On 30 September 1985, the plaintiffs sought from the receiver an extension of the term of the lease to 30 June 1986 but this was refused. The lease expired on 31 December 1985 but the plaintiffs remained in possession until 30 April 1986 when they vacated the demised premises and delivered possession thereof to the receiver. The receiver had demanded the rent and service charge of the demised premises and the plaintiffs had paid the same. On 29 April 1986 the plaintiffs lodged another caveat under s. 104 of the Land Titles Act, seeking to protect their "equitable lien", this time founded on the implied term of a periodic tenancy of the demised premises, which, they said, came into existence after the expiry of the lease. On 4 July 1986 the plaintiffs through their solicitors demanded from the 2nd defendants repayment of the sum of $6,041,622 but this was not acceded to.

After receiving a notice under s. 108 of the Land Titles Act from the Registrar of Titles on 4 September 1986 for registration of a transfer unless a Court order to the contrary was obtained, the plaintiffs instituted these proceedings claiming against the 1st defendants for payment of the sum of $6,041,622 and against the 2nd and 3rd defendants for a declaration that the periodic tenancy created included a covenant in terms of Clause 3(2) of the lease and was binding on them or alternatively for a declaration that the plaintiffs have an equitable lien on the demised premises ranking prior to the interest of the 2nd defendants under the mortgage.

The 1st defendants did not resist the claim and the plaintiffs obtained judgment against them while the 2nd and 3rd defendants disputed the claim.

Held:

[1] The amount of $6,041,622 was paid to and was held by the 1st defendants as security for the due observance and performance by the plaintiffs of the terms and conditions of the lease. No part of the sum of $6,041,622 had been paid by the plaintiffs for or in respect of the Building, nor was it paid for any improvement thereof. There is absolutely no basis for declaring that an equitable lien arose out of this payment.

[2] Even if this tenancy can be implied it was the 1st defendants who were the landlords and the obligation to refund the amount of $6,041,622 remained with them and had never passed to the 2nd defendants; it was a personal obligation. The 2nd defendants had done nothing to conceivably show that they had accepted the burden of repaying to the plaintiffs this large sum of money or the existence of a lien on the Building to secure the repayment thereof.

[Claim against 2nd and 3rd defendants dismissed with costs.]

Cases referred to:

Rose v. Watson [1864] 10 HLC 672 [11 ER 1187]
Middleton v. Magnay [1864] 2 H & M 233 [71 ER 452]
Whitbread & Co. Ltd. v. Watt [1902] 1 Ch. 835
Hua Chiao Commercial Bank Ltd. v. Chiaphua Industries Ltd. [1987] AC 99

Legislation referred to:

Conveyancing and Law of Property Act [Sing], s. 29
Land Titles Act (Cap 157) [Sing], ss. 39, 64, 104, 108(1)

For the plaintiffs - Nigel Hague QC (K.S. Chung with him)
For the 2nd & 3rd defendants - Micheal Barnes QC (S. Rajendran with him)

JUDGMENT

LP Thean J:

The facts in these proceedings are not in dispute, and, so far as relevant, are these. By a lease dated 27 April 1976 ("the lease") the 1st defendants, who were then the owners of a building known as the UMBC Building ("the Building") demised to the plaintiffs parts of the Building consisting of the basement, the ground, 1st, 2nd, 3rd, 4th, 6th and 7th floors and the penthouse (hereinafter together called "the demised premises") for a term of 10 years commencing form 1 January 1976 at a quarterly rent and service charge totalling $302,081 and payable quarterly in advance. The title to the Building is one issued under the Land Titles Act (Cap. 157, 1985 Edn.) and is comprised in two certificates of title registered in Vol. 103 and 118 Folios 10 and 21 respectively. Strangely enough, though nothing turns on this,

the lease was not in a form prescribed under the Act. The lease, after execution, was never registered with the Registry of Titles; presumably, it was not registrable as (apart from not being in a prescribed form) it was a lease for parts of the Building for a term exceeding 7 years and no sub-division approval for the demised premises had been obtained under the Planning Act. Under Clause 3(2) of the lease, the plaintiffs were obliged to pay to the 1st defendants a sum of $6,041,622 on or before the execution of the lease by way of deposit or security for the due performance and observance by the plaintiffs of all the terms and conditions of the lease, and they duly paid the sum to the 1st defendants. Under the same clause the sum was refundable by the 1st defendants to the plaintiffs after the expiry of the term of the lease.

On 27 July 1982, the 1st defendants executed a mortgage of the Building to the 2nd defendants as agents for themselves and the 3rd defendants to secure the repayment by a company, International Consolidated Investments Limited, of all moneys, interests and other liabilities from time to time due to the 2nd and 3rd defendants under a loan agreement as therein provided. At the time when the 2nd defendants took the mortgage they had knowledge that the plaintiffs were tenants in possession of the demised premises for a term expiring on 31 December 1985. This was admitted by Mr. Soh Kim Soon, a director of the 2nd defendants, in his affidavit deposed to on 11 February 1988. This knowledge, according to him, was derived from a valuation report of the Building, in which it was stated that the Building was let out to various tenants as set out in a schedule which contained "details of each tenant, the area occupied, the commencement and expiry dates of the various leases and the monthly rent." However, he said that the 2nd and 3rd defendants had no knowledge of the lease and the provisions of Clause 3(2) thereof. That denial of knowledge I cannot accept. First, the valuation report obviously was prepared with a view to assisting the 2nd defendants in evaluating the Building for the purpose of the mortgage and since the brief particulars of the tenancies appeared in the schedule to the valuation report, the 2nd defendants as a prudent financier would have called for a copy of the lease and examined the provisions thereof. Secondly, in an important transaction, such as the mortgage of the Building which obviously was to secure a large sum of money, the 2nd defendants' legal adviser, as a prudent solicitor, would have made the necessary searches and enquiries of the Building; would have found out that a lease or tenancy agreement had been made between the 1st defendants and the plaintiffs; would have called for a copy of the lease for perusal, and would have examined the provisions of the lease and reported to the 2nd defendants the material provisions thereof. It may well be that no one at that time had the prescience that a provision such as Clause 3(2) could or would give rise to a litigation or dispute such as that which has now arisen. Be that as it may, the mortgage was executed and completed and was registered with the Registry of Titles. Subsequently, a variation of the terms of the mortgage was executed on 6 February 1985, and the instrument of variation was also registered.

In 1985 or thereabouts, financial problems of the 1st defendants developed and the 2nd defendants had to resort to the mortgage; they exercised their rights as a mortgagee and appointed one Mr. Peter M.K. Chi of Peat, Marwick, Mitchell & Co. as receiver of income of the Building (including the demised premises), and notice of the appointment was served on the plaintiffs on or about 3 July 1985 requesting or directing payment of rent to be made to the receiver. Following that, the plaintiffs on 5 July 1985 lodged a caveat under s. 104 of the Land Titles Act seeking to protect their interest under the lease. In compliance with the notice of the receiver, the plaintiffs duly paid the rent and service charge to the receiver. On 28 November 1985, the plaintiffs lodged another caveat seeking to protect what they called

an equitable lien on the property, i.e., the Building. In the caveat the plaintiffs claimed:

> an equitable lien over the land above described securing repayment of the sum of $6,041,622 paid by the caveator to the registered proprietor under Clause 3(2) of a lease dated 27 April 1976 made between the registered proprietor of the one part and the caveator of the other part by way of deposit or security for the due performance and observance by the caveator of the covenants and conditions of the said lease (together with any interest due thereon and the costs of obtaining such repayment.)

On 30 September 1985, the plaintiffs sought from the receiver an extension of the term of the lease to 30 June 1986 which, however, was refused. The lease expired on 31 December 1985 and thereafter the plaintiffs remained in possession of the demised premises. The receiver demanded the rent and service charge of the demised premises and the plaintiffs paid the same as demanded. The plaintiffs continued to remain in possession of the demised premises until 30 April 1986 when they vacated the demised premises and delivered possession thereof to the receiver.

On 29 April 1986 the plaintiffs lodged yet another caveat under s. 104 of the Land Titles Act, seeking to protect their "equitable lien". In substance, what the plaintiffs claimed in this caveat is same as that claimed in the earlier caveat, but the claim on this occasion was expressed to be founded on the implied term of a periodic tenancy of the demised premises, which, they said, came into existence after the expiry of the lease. By a letter of 4 July 1986, the plaintiffs through their solicitors demanded from the 2nd defendants repayment of the sum of $6,041,622 together with interest from 14 May 1986 until payment. As expected, this demand was not acceded to.

On 4 September 1986, the plaintiffs received a letter dated 3 September 1986 from the Registrar of Titles giving notice to the plaintiffs under s. 108(1) of the Land Titles Act that a transfer made between the 2nd defendants and The Development Bank of Singapore Limited had been presented for registration, and that the transfer would be registered on the expiration of 21 days thereof unless within the said period an order of Court to the contrary was obtained. The plaintiffs thereupon instituted these proceedings, and on 19 September 1986 applied for and obtained an interim order restraining the Registrar of Titles from registering the transfer and directing the 2 caveats to remain in the register until the hearing of a motion on 10 October 1986 for the continuation of the interim order. The interim order was subsequently extended and is still in force.

The plaintiffs claimed against the 1st defendants for payment of the sum of $6,041,622 and interest thereon as from 14 May 1986, and claimed against the 2nd and 3rd defendants for, *inter alia*, the following:

(i) a declaration that a periodic tenancy of the demised premises was created in favour of the plaintiffs with effect from 1 January 1986 and that the periodic tenancy included a covenant in terms of Clause 3(2) of the lease and that the periodic tenancy was binding on the 2nd defendants as agents for themselves and the 3rd defendants, or in the alternative

(ii) a declaration that the plaintiffs have an equitable lien on the demised premises ranking prior to the interest of the 2nd defendants under the mortgage.

The 1st defendants did not resist the claim and the plaintiffs obtained judgment against them. The 2nd and 3rd defendants, however, disputed the claim, and the issues raised before me are:

(i) whether the plaintiffs have an equitable lien on the demised premises by virtue of the covenant contained in Clause 3(2) of the lease under which the 1st defendants as the lessors were obliged to refund to the plaintiffs the sum of $6,041,622, and

(ii) whether there was a periodic tenancy of the demised premises binding on the 2nd and 3rd defendants after the expiry of the lease, and if there was such a periodic tenancy, whether it was on the same terms and conditions as those contained in the lease (in so far as they are consistent with a periodic tenancy) including the covenant in Clause 3(2) of the lease.

On the first issue, Mr. Hague on behalf of the plaintiffs argued that under Clause 3(2) of the lease a sum of $6,041,622 was paid to the lessors as security for the due performance and observance by the lessees of all the terms and conditions of the lease and the lessors undertook to repay this amount after the expiration of the term of the lease. Such an obligation on the part of the lessors, he submitted creates an equitable lien on the demised premises. In support he relied on those cases, such as *Rose v. Watson* [1864] 10 HLC 672 (11 ER 1187); *Middleton v. Magnay* [1864] 2 H & M 233 (71 ER 452) and *Whitbread & Co. Ltd. v. Watt* [1902] 1 Ch 835, which decided that where a purchaser has paid under a contract money to account of the purchase price of the property agreed to be purchased and the contract goes off through no fault of the purchaser, he has an equitable lien on the property. The same principle, Mr. Hague argued, should apply to the instant case by analogy. That argument I am unable to accept. The case of a purchaser acquiring an equitable lien on the land for the purchase-money paid therefore is by no means analogous to the instant case. A purchaser who has entered into a binding contract for the purchase of the land in question becomes the beneficial owner thereof, subject to payment of the purchase price in full. This beneficial ownership is defeasible in the event that the contract is rescinded or terminated by reason of a default on the part of the purchaser. But while the contract subsists, each payment he makes is towards payment of a corresponding part of the land. If the purchaser is not in default and the contract is rescinded or terminated, it must follow that what he has paid for is secured on the land to the extent of such payment, and on that basis he has an equitable lien on the land. This was very clearly and amply stated by Lord Westbury in *Rose v. Watson* (*supra*). He said, at pp. 678-679:

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.
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> My Lords, that being so, we have only to inquire under the terms of the present contract whether the sums of money paid by the respondent were, or were not, paid in pursuance of that contract. About that, my Lords, there is no controversy whatever. They were *bona fide* payments made by the respondent, in conformity with the contract which required such payments to be made in part of the purchase-money; and they were accepted by the vendor as portions of that purchase-money. In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.
>
> Then, My Lords, if that contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the obvious question arises. Is the purchaser to be deprived of the interest in the estate which he has acquired by that *bona fide* payment?

...

And later he said, at p. 682:

> ... It was money advanced upon the faith that the land, the subject of the contract, would become the property of the respondent (the purchaser); and being so paid as part of the purchase-money under the contract, and being paid in advance, on the faith of the vendor's performance of the contract, I think that your Lordships will have little difficulty in coming to the conclusion that those sums of money thus paid formed principal sums, in respect of which there became a lien from the time of the payment of them; in consequence of the subsequent failure of the vendor to perform the contract, and becoming such lien, they bore fruit consequently-that is to say, they entitled the person who is possessed of that lien to claim interest in respect of them.

Similar pronouncement was made by Lord Cranworth but more concisely, at pp. 683-684:

> ... There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent.

In the instant case, the amount of $6,041,622 was paid to and was held by the 1st defendants as security for the due observance and performance by the plaintiffs of the terms and conditions of the lease. No part of the sum of $6,041,622 had been paid by the plaintiffs for or in respect of any part of the Building. Plainly, the nature of such payment is entirely different from that of a payment of purchase-money by a purchaser for the land agreed to be purchased. I cannot see how the principles as enunciated by Lord Westbury and Lord Cranworth can really apply.

Of the authorities cited by Mr. Hague the nearest case to our present situation is *Middleton v. Magnay* (*supra*). There, the defendant had agreed to grant a lease of a paper mill to the plaintiff and it was agreed, *inter alia*, that the plaintiff would expend certain amount of moneys on improvement of the premises, and that if the defendant failed to grant the lease or procure the granting thereof within three months he would refund to the plaintiff the amount the latter had spent on the improvement, and the plaintiff would be at liberty to quit and deliver possession of the premises to the defendant and the agreement would come to an end except as to the plaintiff's right of recovery of the amount expended. The plaintiff entered into possession and expended a sum of money on improvement of the premises but the defendant, however, failed to grant or procure the granting of the lease to the plaintiff for want of title. The plaintiff sued for specific performance of the agreement or alternatively that the plaintiff's outlay on the premises be declared a charge thereon. As specific performance was not possible because of the want of title on the part of the defendant the Court declared that the plaintiff had a lien on the estate or interest of the defendant in the premises to secure the repayment of all moneys expended on the premises together with his costs. Wood V.C. said, at p. 453:

> ... But in this case the plaintiff has a clear right to a lien upon the vendor's interest for the money expended by him on the property. There is an implied contract in every case between vendor and purchaser, that the purchaser shall have a lien on the property to the extent of the purchase-money he has paid, and here there is an express stipulation that the money

expended shall be repaid. This right will sustain a claim for damages just as much as the right to specific performance of the contract to grant a lease which has dropped by reason of the impossibility of performance.

It seems to me that the basis for the declaration of the lien for the sum was the expenditure thereof on the premises; if the amount was expended or paid for other purposes unconnected with improvement of the premises no lien could possibly arise. That clearly is the distinction between that case and the instant one. As I have said, no part of the amount of $6,041,622 was paid for any part of the Building; nor was it paid for any improvement thereof. There is absolutely no basis for declaring that an equitable lien arose out of this payment.

There are two further difficulties in the way of the plaintiffs' claim for an equitable lien. First, it was conceded by Mr. Hague that the covenant contained in Clause 3(2) under which the 1st defendants, as the lessors, were obliged to refund the sum of $6,041,622 is a personal obligation on the part of the 1st defendants only - for which the plaintiffs had obtained judgment - and is not one which touches and concerns the land and therefore does not pass to their successor in title. This point has been resolved in the recent decision of the Privy Council in *Hua Chiao Commercial Bank Ltd. v. Chiaphua Industries Ltd.* [1987] AC 99. If such a covenant was a personal obligation (as has been held) and the amount was not paid for the acquisition of any interest or estate in the Building or for any improvement of the Building, I do not see how, in these circumstances, an equitable lien on the demised premises could arise to secure the discharge of that obligation.

Secondly, assuming that such an equitable lien could arise, it arose at the time when the said sum was paid to the 1st defendants. That equitable interest is not registrable under the Land Titles Act. But the Act recognises non-registrable interest in land, and under s. 104 any person claiming an interest in land or any person otherwise authorised by any Act to do so may lodge with the Registrar of Titles a caveat in a prescribed form to protect such interest. No caveat, however, was lodged by the plaintiffs at that time or subsequently prior to the registration of the mortgage in favour of the 2nd defendants, and, therefore, under the Act such an equitable lien (assuming it existed) cannot rank prior to the interest of the 2nd defendants as a mortgagee. This position, in my view, is unaffected by any notice which the 2nd defendants had of the equitable interest of the plaintiffs: see s. 39 of the Land Titles Act. It therefore follows that the 2nd defendants took the mortgage free of any equitable interest of the plaintiffs.

Finally, Mr. Hague founded his argument on the short tenancy for the period from 1 January to 30 April 1986, which, he argued, in the circumstances must have been created. The lease expired on 31 December 1985, and thereafter the plaintiffs held over for a period of 4 months and delivered possession of the demised premises to the receiver on 30 April 1986. During this short period the receiver demanded rent and service charge of the demised premises and they were paid by the plaintiffs. By reason of such conduct of the parties, Mr. Hague submitted that a periodic tenancy binding on the 2nd and 3rd defendants was created, and the tenancy was on the same terms and conditions of the lease in so far as consistent with a periodic tenancy and such terms and conditions included the covenant in Clause 3(2). Even if this periodic tenancy can be implied, I do not see how it can assist the case of the plaintiffs. If there was this periodic tenancy it was the 1st defendants who were the landlords; such a tenancy could only be implied from the demand and receipt of the rent and service charge by the receiver, and the receiver was the agent of the 1st defendants: see s. 29 of the Conveyancing and Law of Property Act as applied by s. 64 of the Land Titles Act. If the 1st defendants were the landlords, the obligation to refund the amount of $6,041,622 remained

with them and had never passed to the 2nd defendants; it was a personal obligation of the 1st defendants. Even if one goes further and says that in relation to this implied periodic tenancy the 2nd defendants were the landlords and that such tenancy was on the same terms and conditions of the lease in so far as consistent with a periodic tenancy, such terms cannot possibly include the covenant in Clause 3(2), because firstly, such a covenant was a personal obligation of the 1st defendants and had never passed to the 2nd defendants, and, secondly, the 2nd defendants had never received the amount. The 2nd defendants had done nothing which could conceivably lead me to hold that they had accepted the burden of repaying the plaintiffs this large sum of money or the existence of a lien on the Building to secure the repayment thereof.

The conclusion I arrive at is this: Whether under the lease or under the implied periodic tenancy no equitable lien can really arise under the covenant in Clause 3(2). The claim of the plaintiffs against the 2nd and 3rd defendants fails and is dismissed with costs. The interim order which is presently in force is discharged.

P.S.

Further Orders:

(1) Stay of execution on discharge of interim order for 3 weeks from today, i.e., 16 February 1989.

(2) Application for certificate of 2 Counsel refused.

Also found at [1989] 2 CLJ 309